

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

NOV 18 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0239-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
PAUL PETER GODOY,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092070001

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Joy Athena

Tucson
Attorneys for Petitioner

ESPINOSA, Judge.

¶1 Petitioner Paul Godoy seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged the court had erred in ordering restitution. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Godoy has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Godoy was convicted of burglary in the second degree of a residential structure. The court suspended the imposition of sentence and placed him on probation for 2.5 years. It also ordered him to pay \$585.48 in restitution to the victims and \$2,750.05 in restitution to Allstate Insurance. This court affirmed Godoy’s conviction and sentence on appeal. *State v. Godoy*, No. 2 CA-CR 2010-0005 (memorandum decision filed Sept. 17, 2010). Thereafter, Godoy filed a notice and petition for post-conviction relief alleging “a portion of the restitution ordered” should be vacated “because it was either not a direct consequence of the offense for which Godoy was convicted, or the victims provided no reasoned basis for the amount.” The trial court concluded the claim was precluded “as it was waived at trial.”

¶3 On review, Godoy essentially repeats the arguments he made below, relying on *State v. Vermuele*, 226 Ariz. 399, 249 P.3d 1099 (App. 2011), for the proposition that his claim was not waived at trial because he had no opportunity to object once sentenced and arguing the trial court “too narrowly construed *Vermuele*.” We, however, agree with the trial court’s analysis of the application of *Vermuele* in this case: “Unlike *Vermuele* where the court found that defendant had no opportunity to object once

sentenced, Godoy was provided with the exact restitution amounts that were imposed by the court prior to sentencing in the presentence report.” The situation here was not one in which “the basis for th[e] claims did not become apparent until the court’s pronouncement of the sentence.” *Id.* ¶ 6. As the trial court correctly concluded, Godoy had ample opportunity to object to the amount or type of restitution and he failed to do so. Therefore the exception to the principles of waiver and fundamental error set forth in *Vermuele* does not apply here. *Id.* ¶ 14.

¶4 Furthermore, Godoy did not present his restitution argument on appeal. And, although he claims he “could not have raised the claim as fundamental error because the documents necessary to show that the claimed restitution violated Arizona law . . . were not in the record on appeal,” he fails to develop any argument as to how or why that was the case or to cite any authority in support of his position. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review shall contain “reasons why the petition should be granted”); *cf. State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claims waived for insufficient argument on appeal). In any event, although it appears he is correct that the victim’s restitution affidavit and the police report were not included in the record on appeal, the record did contain the presentence report, which noted not only the amount of restitution claims, but also referenced some items the victims claimed were lost or damaged. Thus, there was adequate evidence in the record for Godoy to have raised this claim on appeal and he failed to do so.

¶5 Because Godoy forfeited this argument at trial and waived it on appeal, the trial court did not abuse its discretion in finding his claim precluded. *See* Ariz. R. Crim. P. 32.2(a)(3). Therefore, although we grant the petition for review, relief is denied.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge